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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re K.E., a Person Coming Under the
Juvenile Court Law.

TULARE COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

K.B.,

Defendant and Appellant.

F060607

(Super. Ct. No. JJV060974)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Tulare County. Charlotte A. Wittig, Commissioner.

Valerie N. Lankford, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen Bales-Lange, County Counsel, John A. Rozum and Carol E. Holding, Deputy County Counsel, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Kane, J., Franson, J.

K.B. (mother) appeals from juvenile court orders denying her petition for reunification services and terminating parental rights to her two-year-old son. (Welf. & Inst. Code, §§ 388 & 366.26.)¹ She contends the court erred by summarily denying her petition and rejecting her claim that termination would be detrimental to the child. On review, we disagree and affirm.

PROCEDURAL AND FACTUAL HISTORY

Mother has a long-term drug problem, which has interfered with her ability to parent. In 2006, she regularly used controlled substances while she was pregnant and later gave birth to a drug-exposed infant, who suffered withdrawal symptoms. The infant was adjudged a juvenile dependent and removed from parental custody. Despite family reunification services, neither mother nor the infant's father complied with the court-ordered service plan. A juvenile court terminated services in February 2007 and, later that year, terminated parental rights.

Less than three years later, the underlying dependency proceedings commenced regarding the couple's seventeen-month-old son, K.E. (the child). He lived with the father, among others. A family friend cared for the child in the father's home. Mother had not lived there since the summer of 2009 when the couple broke up. Occasionally, she came by to visit. While there, she also used drugs.

In early January 2010, mother stayed the night at the home when law enforcement conducted a search of it and discovered methamphetamine and drug paraphernalia. The father was suspected of selling methamphetamine out of the home. Police found a pipe and methamphetamine in the room where mother spent the night. Methamphetamine smoke also pervaded the home. Mother, along with the father and his current girlfriend, were arrested.

¹ All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Mother eventually admitted she was using methamphetamine, but appeared to minimize the frequency, saying she only used one or two times a week. Mother was pregnant as well.

Respondent Tulare County Health and Human Services Agency (agency) detained the child and petitioned the court to exercise its dependency jurisdiction over him pursuant, in part, to section 300, subdivision (b), based on the parents' respective neglect of the child and the effect their drug problems had on their ability to care for him. The agency also recommended that the juvenile court deny the parents reunification services due to: their failure to reunify with the child's older sibling and failure to subsequently make a reasonable effort to treat the problems which led to the sibling's removal (§ 361.5, subd. (b)(10)); the fact that parental rights over that sibling had been terminated and the parents had not subsequently made a reasonable effort to treat the problems which led to the sibling's removal (§ 361.5, subd. (b)(11)); and the parents' history of extensive, abusive, and chronic drug use and resistance to prior court-ordered treatment for their problems during the three-year period immediately prior to the filing of the dependency petition for this child (§ 361.5, subd. (b)(13)).

In early February 2010, mother was released from jail and entered the local drug court. As a drug court participant, she was to drug test on a random basis at least weekly and enter an out-patient drug treatment program. The program included one year of education and process groups, six months of aftercare, and attendance at four AA/NA meetings each week. Upon successful completion of the aftercare portion of the program, she would be eligible to apply for dismissal of the charges against her. Following her release from custody, mother was also able to participate in weekly visits with the child.

At a March 2010 hearing, the juvenile court found true the agency's allegations regarding the parents' neglect and drug abuse and, accordingly, exercised its dependency jurisdiction over the child. It also adjudged the child a juvenile dependent and removed

him from parental custody. The juvenile court denied both parents reunification services pursuant to section 361.5, subdivision (b)(10), (11) and (13), but ordered weekly, supervised visits between the child and mother. It further set the case for a section 366.26 hearing to select and implement a permanent plan for the child.

A week before the scheduled section 366.26 hearing, mother petitioned to modify the juvenile court's order denying her reunification services. The court heard argument about whether mother made a prima facie showing so that the court should grant her an evidentiary hearing.² In the process, it took judicial notice of the entire case file, except for a response the agency filed to mother's petition. Following the attorneys' arguments, the court found mother had not met the threshold requirements for a full hearing and denied the section 388 petition.

Meanwhile, the agency filed a "366.26 WIC Report" in which it reported that the child was likely to be adopted and recommended the court terminate parental rights. The agency placed the child in January 2010 with caregivers who had adopted his older brother. The caregivers were committed to adopting the child, who was secure and thriving in their care. It is undisputed that the child is likely to be adopted.

Relevant to this appeal, the report discussed mother's weekly visits with the child. The child arrived in a good mood, appeared to enjoy the interaction with mother, and left without protest. Mother was appropriate, although she assertively encouraged the child to use the word "mommy," repeating the term until he used it. The visits and relationship between the child and mother appeared "benign" to the adoptions social worker. In no way did it rise "to the description of bond or of benefit to the [child]."

At the section 366.26 hearing, the court received the agency's report and once again took judicial notice of its entire file. Mother then testified in opposition to the agency's recommendation.

² The contents of mother's petition are set forth in our Discussion.

According to mother's testimony, she did not miss any of her scheduled visits with the child. When he arrived, he went straight to her, gave her kisses, and sat in her lap for the first 15 minutes. Afterwards, they played at a nearby playground and had snacks, which mother brought. Their visits lasted one hour. At the end of their visits, he would blow her kisses.

The day before the hearing the child turned two years old. He was talking a little bit and called her mom.

When their visits first began, he would cry when she took him. The people who brought him would have to bribe him with french fries to remain with her.

According to mother, the child lived with her since his birth until July 2009 when she and the child's father "split up." After that, the child lived with his father until detention. The father would not let her take the child. Mother, nevertheless, claimed she came to the father's house every day, although she also left because he beat her. Still, she took care of the child's basic needs. She and the child were together all the time. He was her baby. She felt she and the child probably remained the same, in terms of closeness, since detention.

Mother's attorney argued the child needed to maintain his relationship with mother. The agency's counsel and the attorney for the child argued for termination.

The court rejected mother's argument. Although the court had no doubt mother loved her child, she had not presented sufficient evidence to outweigh the presumption that termination was in the child's best interest, as well as the sense of security and belonging an adoptive home would have for the child. Having found the child was likely to be adopted, the court terminated parental rights.

DISCUSSION

Introduction

A parent and child in juvenile dependency proceedings share a fundamental interest in reuniting, but only to a point. (*In re R.H.* (2009) 170 Cal.App.4th 678, 697.)

Once a court terminates reunification services or, as in this case, denies services at the outset, the interests of the parent and the child diverge. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254.)

The child has a fundamental, independent interest in belonging to a family unit, as well as compelling rights to be protected from abuse and neglect. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 306 (*Marilyn H.*)). In addition, the child is entitled to have a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child. (*Ibid.*)

Consequently, at the permanency planning stage, the court's focus shifts from family reunification toward promoting the child's need for permanency and stability. (*Marilyn H., supra*, 5 Cal.4th at p. 309.) Furthermore, adoption gives the child the best chance at a full emotional commitment from a responsible caretaker. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.)

Mother has lost sight of this shift in the court's focus, as well as her son's need for permanency and stability in fashioning her arguments, both in the juvenile court and on appeal. Her arguments also depend on her narrative of her relationship with the child. However, she ignores the conflicting evidence before the court.

Mother had a long-term drug problem preceding and following the birth of this child. She lived with him for only the first year of his life. She also continued to abuse drugs until her arrest in January 2010. Her subsequent sobriety, under the watchful eye of the drug court, did not compel a conclusion that services for her might promote the child's immediate need for permanence and stability.

In addition, another person cared for the child in mother's absence, both before and after detention. There was also no evidence that the child was adversely affected by mother's absence from his life. Mother admitted that the child, after not seeing her for approximately a month, was reticent to visit her and had to be bribed to stay with her. Even mother's evidence that the child called her "mom" was contradicted by the adoption

social worker's report that mother assertively repeated the word to the child until he mimicked her.

As discussed below, we conclude the juvenile court did not abuse its discretion by either summarily denying mother's modification petition (*In re Stephanie M.* (1994) 7 Cal.4th 295, 316-318) or rejecting her argument that termination would be detrimental to the child (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351).

Summary Denial of Section 388 Petition

Mother contends she stated a prima facie case for modification and, therefore, was entitled to an evidentiary hearing on the matter. As discussed below, we disagree.

The modification petition alleged:

"Mother has completed the second phase of Drug Court and has tested free of any drugs in excess of 5 months. Her clean date is 01/05/2010. She completed a parenting education program with perfect attendance, is compliant with the [outpatient] Program and has attended NA meetings 4 times per week since 02/11/2010. She consistently makes all of her weekly visits with her child."

It also alleged providing mother reunification services would be in the child's best interests because:

"[t]he mother is diligently treating the issues that led to the removal of, and the Court's jurisdiction over, the child. Reunification services will facilitate efforts at reunifying the mother and the child."

Attached to the petition were: a letter from the drug court judge stating mother was in the second phase of the program and had tested drug free for more than five months; a May 28, 2010 letter from her outpatient services director stating mother was "working an excellent program of recovery and seems sincere about her commitment to her sobriety;" a certificate of completion issued July 1, 2010 to mother for an 18-week parent training course; a certificate recognizing mother's perfect attendance at the parent training course; and a declaration by mother under penalty of perjury.

In her declaration, mother stated she had been clean since she went to jail on January 5, 2010, and consistently attended four NA meetings a week since she entered drug court. She also stated:

“I feel that my son ... and I have a significant bond. When he comes to our visits, he comes straight to me. I ask for him [sic] a kiss and he lays his head over towards me. He calls me “mom.” During my visits with [him], we do various activities in the park such as playing on the swings. I plan activities with [him]. I bring boxes of toys and big balls for us to play with together I take clothes, drinks, and fruit snacks to the visits. [¶] ... [¶] ... [¶] ... I [am] trying to do as much as I can for [him] and myself so that we can be together as a family.”

When the juvenile court denied mother’s modification petition, it explained:

“...There is some change, but it is not a change -- a complete change of the circumstances that brought this child before the Court and the best interest of the child, [it is] conjecture on the part of the mother.

“There is no evidence before the Court that it is truly in this child’s best interest to continue with services. And, in fact, there is a rebuttable presumption at this stage of the proceedings that continued foster care is in the best interest of the child and that presumption applies even with greater strength when the proposed permanent plan is adoption.”

Mother claims the court erred because she was not required to prove a “complete change” in order to trigger her right to an evidentiary hearing. Instead, all that she was required to show, for purposes of a hearing, was that the relief she sought might be in the child’s best interests. She cites in this regard section 388, subdivision (d), which provides in part “[i]f it appears that the best interests of the child may be promoted by the proposed change of order ... the court shall order that a hearing be held”

By focusing on the juvenile court’s words, mother ignores the rule that the juvenile court’s reasoning is not a matter for this court’s review. (*Davey v. Southern Pac. Co.* (1897) 116 Cal. 325, 329.) Rather, it is judicial action, not judicial reasoning, which is the proper subject of appellate review. (*El Centro Grain Co. v. Bank of Italy, Etc.* (1932) 123 Cal.App. 564, 567.)

Having reviewed the record, we conclude the juvenile court did not abuse its discretion by summarily denying mother's modification petition. Her petition contained no evidence that the child's best interests, including his need for permanence and stability, might be promoted by ordering reunification services for mother. Consequently, she failed to make a prima facie showing for modification. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.)

No Detriment

Section 366.26, subdivision (c)(1)(B) acknowledges parental rights termination may be detrimental to a dependent child under specifically designated circumstances. In particular, section 366.26, subdivision (c)(1)(B)(i) permits a finding of a detriment in situations where a parent has maintained regular visitation and contact with his or her child, and the child would benefit from a continued relationship with the parent. For the beneficial relationship exception to apply,

“the parent-child relationship [must] promote the well-being of the child to such a degree that it outweighs the well-being the child would gain in a permanent home with new, adoptive parents. [(*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)] A juvenile court must therefore: ‘balance ... the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.’ (*Id.* at p. 575.)” (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1342.)

This statutory exception merely permits a court, in *exceptional circumstances*, to exercise its discretion and choose an option other than the norm, which remains adoption. (*In re Celine R.*, *supra*, 31 Cal.4th at p. 53.) The statutory presumption is that termination is in the child's best interests and, therefore, not detrimental. (§ 366.26, subd. (b); *In re Lorenzo C.*, *supra*, 54 Cal.App.4th at pp. 1343-1344.) Furthermore, it is

an opposing party's burden to show that termination would be detrimental under one of the statutory exceptions. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.)

Mother contends the juvenile court erred by rejecting her argument that terminating parental rights would be detrimental to the child. She relies upon her testimony as proof that she and the child shared a loving relationship. In her view, there was insufficient evidence to support the juvenile court's decision. Again, we disagree.

When a court rejects a detriment claim and terminates parental rights, the appellate issue is not whether substantial evidence exists to prove a negative, i.e. termination would not be detrimental, as mother contends, but whether the juvenile court abused its discretion in rejecting a claim that termination would be detrimental. (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.) Thus, from the outset, mother's argument fails because she relies upon an incorrect standard of review.

In addition, for this court to conclude the juvenile court abused its discretion, the proof offered would have to be uncontradicted and unimpeached so that discretion could be exercised in only one way, compelling a finding in favor of the appellant as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 570-571; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) In this case, it is undisputed mother maintained regular visits with the child. Otherwise, there was conflicting evidence, as detailed above, regarding the nature and extent of her relationship with the child. Also, a parent must demonstrate more than pleasant visits or loving contact. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 953-954.) In the end, there was no evidence that terminating parental rights would deprive the child of a substantial, positive emotional attachment such that he would be greatly harmed. (*In re Lorenzo C.*, *supra*, 54 Cal.App.4th at p. 1342.) Thus, the juvenile court did not abuse its discretion by rejecting mother's argument.

DISPOSITION

The order terminating parental rights is affirmed.